Supreme Court, U. S.
FILED
JAN 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-614

U-ANCHOR ADVERTISING, INC.,

Petitioner,

v.

N. H. BURT, d/b/a GRANOT LODGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES D. DURHAM, JR.
KENNETH A. BACK
Attorneys At Law
of Durham & Cornett
510 S. Polk
Amarillo, Texas 79101

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.	i
TABLE OF AUTHORITIES	ii
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED. . . .	1
STATEMENT OF THE CASE.	2
RESPONDENT'S ARGUMENT.	2
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:	Page
Bland v. Kentucky Fried Chicken Corp., (D.C. 1971) 338 F. Supp. 871	5
Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958)	2,3
International Shoe Company v. Washington, 326 U.S. 320, 66 S.Ct. 154, 90 L.Ed. 95 (1945)	2,3
McGee v. International Life Insurance Company, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957)	2,3,4
O'Brien v. Lanpar Company, 399 S.W. 2d 340 (Tex. S.Ct. 1966)	5
Product Promotions, Inc. v. Consteau, 495 F.2d 483 (5th Cir. 1974)	5
Sun-X International Company v. Witt, 413 S.W.2d 761 (Tex. Civ. App. 1967)	5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-614

U-ANCHOR ADVERTISING, INC.,

Petitioner,

v.

N. H. BURT, d/b/a GRANOT LODGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS
RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, N.H. Burt, d/b/a Granot Lodge, respectfully prays that the Court deny issuance of the writ of certiorari in review of Judgment and Opinion of the Supreme Court of Texas entered in this proceeding on July 13, 1977.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

Petitioner's statement as to the statutes involved is correct.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct.

RESPONDENT'S ARGUMENT

Petitioner's description of the questions presented is accurate as stated; Respondent suggests, however, that the ultimate question for review is whether an Oklahoma resident who contracts in Oklahoma with a Texas resident as a result of the Texas resident's solicitation, can be sued in Texas without offending traditional notions of fair play and substantial justice, the Oklahoma resident's only contact with Texas being the mailing of six checks to Texas.

The determination of this question as well as other similar ones has resulted in lower court decisions which at first blush appear to be in conflict. It should be noted, however, that in so-called "long arm jurisdiction cases", fact situations frequently vary in so far as elements of long-arm statutes and due process are concerned. The courts have had, therefore, to focus on different aspects of particular fact situations to arrive at their decisions. The Supreme Court of Texas, in the instant case, correctly applied the guidelines of this Court in deciding the instant case. Under International Shoe Co. v. Washington, 326 U.S. 320, 66 S.Ct. 154, 90 L.Ed. 95, (1945), Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958), and McGee v. International Life Insurance Company, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957), Respondent suggests this Court has provided guidelines which

can be applied without conflict to the lower court's decision here. This Court in the three cases cited above has spoken to the issue of fairness and that certain contacts are required of the defendant so that notions of fair play and substantial justice are not offended; the Supreme Court of Texas specifically noted that in Hanson, supra, at 251, this court stated that "...it is a mistake to assume that this trend (to the flexible standard of International Shoe, supra) heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." Due process standards must be applied to facts in given cases to assure that jurisdiction does not violate the due process restrictions.

In McGee, supra, this Court found that the Due Process Clause did not preclude jurisdiction in a case where the contract which was the subject of the suit was delivered in the forum state, the premiums were mailed from the forum state, and the Plaintiff resided in the forum state. Whether the Texas Supreme Court conflicted with the holding in McGee, as Petitioner states, on what constitutes purposeful action, it is still apparent that this Court also looks to the nature, quality and extent of the contacts of the non-resident when determining whether due process has been fulfilled. Respondent suggests that the Courts must look to the contacts of the non-resident with various points of view (depending on the facts) in order to analyze the particular case properly.

Petitioner's analysis of the different approaches is substantially correct, but it fails to note that in almost every case, the particular court uses a stand-

ard with which to apply the guidelines set forth by this Court. The different approaches merely supplement the guidelines of this Court.

It would be an impossible task to set forth a rule with respect to the ultimate question herein, which could be applied in every case involving due process and long-arm statutes. Respondent asserts that the guidelines previously set down adequately inform the lower courts of the rules to be used.

II.

Respondent disagrees with Petitioner's assertion that Burt's actions in entering into the contract constituted purposeful activity. There is no showing that Burt engaged in any activity with the State of Texas other than the mailing of checks to Texas. In fact, Burt could have assumed that all performance of the contract other than sending the checks would be done in Oklahoma; there is no indication that Burt knew or should have known that U-Anchor would perform in Texas since the contract was solicited, negotiated and consummated in Oklahoma, and since the signs were to be placed in Oklahoma. From the surrounding circumstances it cannot be said that Burt "purposefully" availed himself to Texas jurisdiction. Although Petitioner cites McGee, supra, as its authority, McGee is distinguishable because here the activities corresponding with those in McGee were performed in Oklahoma.

When considering fairness and the determination of whether traditional notions of fair play and substantial justice would be offended, Respondent agrees

that the circumstances surrounding the transaction must be examined. Respondent suggests that it is important that he never physically went to Texas, responded to solicitation in Oklahoma, signed the contract in Oklahoma, and that the signs were placed in Oklahoma. The situation here is dramatically different from the classic long-arm case in which the defendant either entered the forum state in person or by communication and solicited activity and business from the forum state. Federal courts and Texas courts have concluded that it must be fair and reasonable to require the non-resident to defend the suit in the forum state. See Product Promotions, Inc. v. Consteau, 495 F.2d 483 (5th Cir. 1974) and Sun-X International Company v. Witt, 413 S.W.2d 761 (Tex. Civ. App. 1967).

Respondent urges that in almost every case involving a long-arm statute, one can discern facts which show at least some connection with the forum state, such as those mentioned by Petitioner in its brief under the subtitle "B. Fairness", (p. 13, Petitioner's Brief). However, it can be easily discerned that except for payments to Texas, the contacts with Texas are minimal at best when viewing the entire situation.

One must consider the activity in the forum state by the non-resident, the relative convenience of the parties, benefits and protection of state afforded the respective parties and basic equities. Bland v. Kentucky Fried Chicken Corp. (D.C. 1971) 338 F. Supp. 871; O'Brien v. Lanpar Company, 399 S.W.2d 340 (Tex. S. Ct. 1966). The activity in the forum state has been discussed. It appears that after having solicited and done busi-

ness in Oklahoma, it would not be wholly inconvenient for U-Anchor to sue Burt in Oklahoma. However, for Burt to defend himself in Texas, considering that most activity surrounding the contract happened in Oklahoma, would be inconvenient. Burt had reason to believe that U-Anchor would clothe the contract with Oklahoma law since U-Anchor performed, to Burt's knowledge, in Oklahoma. Basic equities point to maintaining the action in Oklahoma.

If the Texas Supreme Court's opinion is affirmed, Article 2031b would not necessarily be rendered unconstitutional. It stands to reason that a long-arm statute may only extend as far as due process may permit; however, even though a case may fit literally within the statute, due process may also limit its application when the totality of facts is considered, and do so without rendering the statute unconstitutional. That is the case here.

CONCLUSION

For the reasons stated above, it is evident that different approaches have been used to determine cases of similar nature; it is also evident that lower courts have been guided by this Court's decision in using their approaches. The Supreme Court of Texas, using its approach, correctly decided the question of jurisdiction in this case. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES D. DURHAM, JR.

Attorney at Law

KENNETH A. BACK

Attorney at Law

Durham & Cornett
510 S. Polk Street
Amarillo, Texas 79101